Filed 10/21/15 P. v. Garcia CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN GARCIA,

Defendant and Appellant.

F068019

(Super. Ct. No. SC060951A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Madeline McDowell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette and Gerald Engler, Chief Assistant Attorneys General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Jeffrey D. Firestone, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

SEE CONCURRING OPINION

The Three Strikes Reform Act of 2012 (hereafter Proposition 36 or the Act) created a postconviction release proceeding for third strike offenders serving indeterminate life sentences for crimes that are not serious or violent felonies. If such an inmate meets the criteria enumerated in Penal Code section 1170.126, subdivision (e), he or she will be resentenced as a second strike offender unless the court determines such resentencing would pose an unreasonable risk of danger to public safety.[1] (§ 1170.126, subd. (f); *People v. Yearwood* (2013) 213 Cal.App.4th 161, 168.)

After the Act went into effect, Steven Garcia (defendant), an inmate serving a term of 25 years to life following conviction of a felony that was not violent (as defined by § 667.5, subd. (c)) or serious (as defined by § 1192.7, subd. (c)), filed a petition for resentencing under the Act. Following a hearing, the trial court found defendant to be an unreasonable risk of danger to the public and denied the petition.[2]

We hold the People have the burden of proving, by a preponderance of the evidence, facts on which a finding that resentencing a petitioner would pose an unreasonable risk of danger to public safety reasonably can be based. Those facts are reviewed for substantial evidence. We further hold, however, that the preponderance of the evidence standard does not apply to the trial court's determination regarding dangerousness, nor does section 1170.126, subdivision (f), create a presumption of resentencing. The ultimate decision — whether resentencing an inmate would pose an unreasonable risk of danger to public safety — instead lies within the sound discretion of

---

[1] Further statutory references are to the Penal Code unless otherwise stated.

[2] Although we refer to the trial court, the judge who originally sentenced defendant was no longer on the bench at the time the resentencing petition was filed. Accordingly, another judge was assigned to rule on the petition. (See § 1170.126, subd. (j).)

Denial of the petition is an appealable order. (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 598.)

the trial court, and is not affected by section 1170.18, subdivision (c). Finding no abuse of discretion, we affirm.

FACTS AND PROCEDURAL HISTORY

On February 2, 1993, defendant was sentenced to an aggregate term of 11 years in prison, following his 1991 conviction of three counts of first degree burglary, and his 1992 conviction of the same offense.[3]

On or about August 8, 1994, a correctional officer walking past defendant's cell saw defendant being tattooed by an inmate who did not belong in that cell. Both inmates were subjected to clothed body searches. A cloth pouch was found in defendant's front pants pocket; inside the pouch was a butane lighter and three bindles of tar heroin, with a total weight of 43 milligrams. As a result, defendant was convicted of possession of a controlled substance in prison (§ 4573.6), and was sentenced, under the three strikes law, to 25 years to life in prison consecutive to the 11 years he was already serving.

On December 7, 2012, defendant filed a petition to recall sentence under section 1170.126. He represented he was statutorily eligible for such relief, and argued he should be resentenced to a second strike term of six years and, as he had served over 14 years, his sentenced should be deemed served.

The People opposed the petition. They pointed, in part, to defendant's juvenile adjudication for first degree burglary, for which he was committed to what was then the California Youth Authority; and his conviction on four counts of first degree burglary and one count of second degree burglary as an adult, as well as his commitment offense. They also pointed to the 34 prison rules violation reports (CDC 115's) he incurred between September 5, 1994, and August 14, 2011.[4] Many were related to alcohol or drug

---

[3] By separate order, we have taken judicial notice of the record on appeal and this court's nonpublished opinion in *People v. Garcia* (Feb. 4, 1999, F028251).

[4] The People appended copies of rules violation reports and related documents to their opposition, as evidence supporting their summary of the various CDC 115's.

abuse, but a number involved conduct such as battery on an inmate, attempted battery on staff, threatening a peace officer, threatening staff, and conduct resulting in the use of a chemical agent. With respect to the two most recent, defendant was found guilty of fighting on or about February 20, 2010, and of sexual activity with an adult in the visiting room on or about August 14, 2011. The People represented they located no records for drug, alcohol, or academic classes, or for vocational or job training, and found only one or two records of defendant having done any work during his incarceration. They noted defendant had violated probation and parole multiple times, and his postrelease plans were unknown. The People argued there was no indication defendant's criminal behavior would change if he was released from prison, and that releasing him would result in an unreasonable risk of danger to public safety.

Appended to the People's opposition was a letter written by defendant to the prosecutor handling the resentencing petition. Defendant related he had been in prison for 20 years, having been 23 years old when he first was imprisoned, and "a young dumb kid" who thought he knew it all and did not want to listen to his parents. He denied the drugs that resulted in his three strikes commitment were his, but claimed he could not have named the true owner without being stabbed to death. Defendant asserted he had never been convicted or in trouble with the law for drugs, and had never been convicted for violence. He said he was now 43 years old and, while he had made mistakes, he had now grown up.[5] He expressed remorse for his past mistakes and for hurting his family and children. He related he was currently in school and "a programmer." He also stated his wife, who worked at a dental office, was going to put him in paid counseling upon release so he could get help adjusting. Defendant said he had changed his life and just needed a chance to prove himself.

---

[5] The record shows defendant was born December 5, 1969.

Also appended to the People's opposition were probation officers' reports. In the one prepared prior to defendant's sentencing hearing on his 1991 offenses, defendant related he began using crack cocaine about 10 months before his arrest, at one point using between $400 and $500 worth of the drug per day. He recalled using this amount for four and a half to five months. Defendant related he had completed nine years of formal education and last attended middle school in 1985. The probation officer's report related defendant had reached an agreement with police that he would plead guilty to three residential burglaries and show officers other homes he had burglarized, in exchange for which he would not be charged with any further burglaries. Defendant told the probation officer that as a result of his cooperation, law enforcement recovered $12,000 to $13,000 worth of property. In defendant's written statement that was included with the probation report, defendant stated he committed burglaries and other thefts because he had a major drug problem.

In the probation officer's report prepared prior to defendant's 1993 sentencing, defendant related he consumed more than a case of beer a day, and had done so since his release from jail in 1992. He stated he had been consuming large amounts of alcohol since age 14, and had never sought or received treatment for alcohol abuse. Defendant also stated he first used cocaine at age 16. He snorted "'a couple of eight balls a day,'" and continued to use that substance until he started smoking crack cocaine the year before. Defendant estimated he had been smoking $600 worth of the drug per day since the year before, and said he smoked it in conjunction with snorting powder cocaine. Defendant related he had been heavily involved in the use of crack and PCP and drinking for some time. He also began using "crank" at age 16, and last used that substance approximately three months earlier. As for the offense for which he was pending sentencing, defendant admitted committing the residential burglary, and explained he was on drugs, wanted money for drugs, and started doing burglaries.

Defendant filed a reply to the People's opposition in which he asserted he had spent over 14 years in prison for the simple possession of 43 milligrams of heroin. He argued that all persons released under Proposition 36 would pose a risk to society, but the question was whether such a person currently was an unreasonable danger. He argued his record was nonviolent, and that his rules violations had decreased in number and seriousness from year to year. He asserted he had come to appreciate the poor choices of his youth, and was programming toward productive citizenship. He argued his strike offenses were not violent and were committed over 20 years ago by a 23-year-old man; he was now 43; he had had no new drug violations since 2005; he had had no new staff-related violations since 2008; and he had had no general conduct violations since August 2011. Defendant also pointed to a laudatory chrono written by a correctional officer in February 2013, which stated in part that defendant's behavior had been "nothing but what [was] expected of him," and that he had made genuine changes in his thinking and behavior, and was currently enrolled in adult basic education classes.[6] He pointed to a second laudatory chrono written by a different correctional officer during the same month, in which the officer stated he had interacted with defendant on a daily basis for almost two years, and that defendant had been conducting himself in a responsible and respectful manner and was working hard to effect a positive change in his life.

Defendant also submitted a support letter from chaplains whose 12-step recovery program defendant was working. The chaplains stated they were ready to be defendant's support and accountability upon release.[7] In addition, defendant's wife wrote that

---

6 Defendant attached copies of the various documents to his reply as exhibits.

7 The letter, which was dated December 20, 2012, related defendant was then working on his "Step Four inventory" in the Love Lifted Me Recovery ministries' 12-step program, which was conducted via correspondence. The chaplains stated they had been acquainted with defendant (although they had never met him in person) since October 2012, and felt he was making excellent progress and was genuinely repentant for his crimes.

defendant would be attending counseling sessions upon release with a licensed clinical social worker who specialized in assisting longterm inmates in adapting to society. Defendant's wife would be providing defendant with a home and assistance in finding a job. Defendant also provided other letters of support, including one from a registered addiction specialist who related defendant's wife and father-in-law stood ready, willing, and able to offer support, guidance, accountability, and love in order to assist defendant. Defendant subsequently submitted two additional laudatory chronos from correctional officers, one of whom had interacted with defendant for two years, and the other of whom had supervised defendant for six months.

The hearing on the petition was continued several times, over defendant's objection, to allow the prosecutor to obtain the confidential portion of defendant's records from the California Department of Corrections and Rehabilitation (CDCR).[8] The People subsequently filed an amended opposition to the resentencing petition. In addition to the information and argument previously submitted, the People related that defendant's current custody classification was CLO-B Custody, which meant staff had to watch him at all times, and that he was housed in a Level IV facility, the most secure type of prison. The People also included information from and argument based on, and appended as exhibits, numerous confidential CDCR reports.

Defendant submitted a supplemental reply to the People's amended opposition, in which he objected to the classification evidence as irrelevant, because defendant's classification was affected in large part by his lifer status, and there was no evidence before the court concerning how classifications were determined. Defendant further

---

[8] These records consisted of a confidential section, and psychological, medical, and mental health records, from defendant's inmate file. The court ordered, in part, that once the records were received, it would review them in camera to determine whether any information would be released to the parties. The parties were required to sign a separate protective order, agreeing to the terms of the nondisclosure order, before the records would be released to them.

requested a full evidentiary hearing with witnesses. Defendant submitted his most recent classification review, which reduced his classification level to MED-A and found double cell housing remained appropriate. He also submitted a certificate of completion, dated April 27, 2013, of Creative Conflict Resolutions, a three-day training in anger management and conflict resolution; and a copy of his CDCR inmate reclassification to "Low Risk," dated April 1, 2010.

The hearing on the petition was held June 4, 2013. After argument, in the course of which defense counsel objected on hearsay and lack of foundation grounds to the contents of the confidential files, the court took the matter under submission in order to review all the documentary evidence and watch a CDCR video explaining the California Static Risk Assessment test.

The court subsequently filed its written ruling, denying the petition for resentencing. The ruling stated, in pertinent part:

> "The Petitioner is entitled to resentencing unless the People prove by a preponderance of the evidence that the Petitioner 'would pose an unreasonable risk of danger to the public safety.'
>
> "When exercising its discretion as to whether or not to resentence a Petitioner who is currently serving a sentence of 25 years to life based on the Three Strikes law, the court may consider 'any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to the public safety.' [Citation.] Therefore, in addition to the various motions and records filed by both sides, the court has considered the Petitioner's medical and mental health records along with his confidential file.
>
> "The court finds that the Petitioner has put into issue his physical and mental health by filing a petition to be resentenced and further finds that physical and mental health records are relevant in deciding whether a new sentence would result in an unreasonable risk of danger to the public safety. Therefore, any objection by the Petitioner to the court reviewing and considering his physical and mental health records is overruled. [¶] … [¶]
>
> "The court finds that the People have met their burden that the Petitioner would pose an unreasonable risk of danger to the public safety. In reaching

this decision, the court believes the People met this burden without consideration of the information in the confidential file. However, the court notes that the information in the confidential file reaffirms and supports the denial of this petition.

"A portion of the information in the confidential file is also contained in the non-confidential portion of the Petitioner's CDCR file. However, there may be more details of certain incidents and others may be named in the confidential file. Although not relied upon to deny this petition, this confidential information reemphasizes the appropriateness of the denial of this petition, even when viewed in light most favorable to the Petitioner.

"In order to maintain the confidentiality of the records used in this Petition, the court makes the following findings and orders. Confidential records were received by the court and mistakenly released to the District Attorney. The District Attorney relied on those records in submitting its AMENDED OPPOSITION filed on May 16, 2013. Both parties were later notified of the error and ordered to return any copies of these records, which they did.

"In order to maintain confidentiality of those records and to uphold the objection by CDCR to their release, the court will prepare a redacted copy of the AMENDED OPPOSTION [*sic*] for public view in the court's file and will place the original in a confidential envelope. In addition, all records from the confidential file will be placed in a confidential envelope. For confidentiality purposes, these records will be treated in the same way that law enforcement personnel files are treated during Pitchess Motions. Therefore, they are only to be seen by judicial officers for purposes of this petition.…

"Because of the sensitive nature, and to comply with any privacy rights the Petitioner may enjoy, his medical and mental health records will be treated in the same manner except that they are not considered confidential as to his attorney or the prosecution for purposes of this petition."

DISCUSSION[9]

---

9 In supplemental briefs, the parties address the application of this court's opinions in *People v. Payne* (2014) 232 Cal.App.4th 579 and *People v. Valencia* (2014) 232 Cal.App.4th 514, and the Third Appellate District's opinion in *People v. Chaney* (2014) 231 Cal.App.4th 1391, to various issues raised on this appeal. As the California Supreme Court has since granted review in all three cases (*People v. Payne*, review granted Mar. 25, 2015, S223856; *People v. Valencia*, review granted Feb. 18, 2015, S223825; *People v. Chaney*, review granted Feb. 18, 2015, S223676), they are no longer citable

I

The Applicable Legal Principles

In order to be eligible for resentencing as a second strike offender under the Act, the inmate petitioner must satisfy the three criteria set out in subdivision (e) of section 1170.126.[10] (*People v. Superior Court* (*Martinez*) (2014) 225 Cal.App.4th 979, 989.) If the inmate satisfies all three criteria, as did defendant, he or she "shall be resentenced [as a second strike offender] unless the court, in its discretion, determines that resentencing the [inmate] would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) In exercising this discretion, "the court may consider: [¶] (1) The [inmate's] criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The [inmate's] disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (*Id*., subd. (g).)

---

precedent (Cal. Rules of Court, rules 8.1105(e)(2), 8.1115(a), (b)), and we do not address them further.

10 "An inmate is eligible for resentencing if: [¶] (1) The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7. [¶] (2) The inmate's current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12. [¶] (3) The inmate has no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." (§ 1170.126, subd. (e).)

A. A TRIAL COURT'S ULTIMATE DETERMINATION REGARDING DANGEROUSNESS LIES WITHIN ITS DISCRETION; ITS RULING, THEREFORE, IS REVIEWED FOR ABUSE OF DISCRETION.

The plain language of subdivisions (f) and (g) of section 1170.126 calls for an exercise of the sentencing court's discretion. "'Discretion is the power to make the decision, one way or the other.' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) "Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; see *People v. Williams* (1998) 17 Cal.4th 148, 162 [abuse-of-discretion review asks whether ruling in question falls outside bounds of reason under applicable law and relevant facts].)

Under the clear language of section 1170.126, the ultimate determination that resentencing would pose an unreasonable risk of danger is a discretionary one. We, therefore, review that determination for abuse of discretion. Of course, if there is no evidence in the record to support the decision, the decision constitutes an abuse of discretion. (See *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1066.)

B. THE BURDEN OF PROOF BY PREPONDERANCE OF THE EVIDENCE APPLIES TO PROOF OF THE FACTS, NOT TO THE TRIAL COURT'S ULTIMATE DETERMINATION.

Defendant asserts a trial court cannot deny resentencing due to dangerousness unless the People have proved dangerousness beyond a reasonable doubt. The People claim the Act does not place any burden of proof on the prosecution.[11]

We agree with case law supporting the assumption that whatever burden exists is on the People. (E.g., *People v. Flores* (2014) 227 Cal.App.4th 1070, 1075-1076; *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1301, fn. 25 (*Kaulick*).)

---

11 We decline to find defendant's burden-of-proof/standard-of-proof claims forfeited.

Section 1170.126, subdivision (d) merely obligates a petitioner to specify, in his or her petition for resentencing, all of the "currently charged felonies" that resulted in his or her indeterminate life sentence as a third strike offender, together with all prior strike convictions. Yet subdivision (g)(3) of that statute refers to the court considering "evidence." Someone must produce such evidence. Although a petitioner may present evidence on the dangerousness issue, in cases in which the People oppose a petition on dangerousness grounds, it is reasonable and fair to place the burden on them to produce evidence in support of their claim resentencing the petitioner would pose an unreasonable risk of danger to public safety. The question then becomes what standard of proof applies.

> "The standard of proof, the United States Supreme Court has said, 'serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.' [Citation.] At one end of the spectrum is the 'preponderance of the evidence' standard, which apportions the risk of error among litigants in roughly equal fashion. [Citation.] At the other end of the spectrum is the 'beyond a reasonable doubt' standard applied in criminal cases, in which 'our society imposes almost the entire risk of error upon itself.' [Citation.] Between those two standards is the intermediate standard of clear and convincing evidence. [Citation.] These three standards are codified in California's Evidence Code. Section 115 of that code states: 'The burden of proof may require a party to … establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. [¶] *Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence*.' (Italics added.)
>
> "If the Legislature has not established a standard of proof, a court must determine the appropriate standard by considering all aspects of the law. [Citation.] No standard of proof is specified in section [1170.126] ….
>
> "'The standard of proof that is required in a given instance has been said to reflect "… the degree of confidence our society thinks [the factfinder] should have in the correctness of factual conclusions for a particular type of adjudication." … The standard of proof may therefore vary, depending upon the gravity of the consequences that would result

from an erroneous determination of the issue involved.' [Citations.]" (*People v. Arriaga* (2014) 58 Cal.4th 950, 961-962.)

"In enacting section 1170.126 as part of Proposition 36, the issue before the voters was not whether a defendant could or should be punished more harshly for a particular aspect of his or her offense, but whether, having already been found to warrant an indeterminate life sentence as a third strike offender, he or she should now be eligible for a lesser term." (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1036.) Although voters could have permitted automatic resentencing, under any and all circumstances, of those eligible therefor, they did not do so. This demonstrates a recognition of two highly plausible scenarios: (1) Some inmates sentenced to indeterminate terms under the original version of the three strikes law for crimes not defined as serious or violent felonies may have started out not posing any greater risk of danger than recidivists who will now be sentenced to determinate terms as second strike offenders under the prospective provisions of the Act, but have become violent or otherwise dangerous while imprisoned, or (2) Enough time might have passed since some inmates committed their criminal offenses so that those offenses no longer make such inmates dangerous, but other factors do. Because of the severe consequences to society that may result if a dangerous inmate is resentenced as a second strike offender and released to the community upon completion of his or her term with little or no supervision (see, e.g., § 3451) and without undergoing any suitability assessment (see, e.g., *In re Lawrence* (2008) 44 Cal.4th 1181, 1204), we believe it appropriate to apportion the risk of error in roughly equal fashion.

Division Three of the Second District Court of Appeal has held the People bear the burden of proving "dangerousness," for purposes of section 1170.126, subdivision (f), by a preponderance of the evidence. (*Kaulick, supra,* 215 Cal.App.4th at pp. 1301-1305 & fn. 25; see Evid. Code, § 115.) That court determined this is so because "dangerousness is not a factor which enhances the sentence imposed when a defendant is resentenced

under the Act; instead, dangerousness is a hurdle which must be crossed in order for a defendant to be resentenced at all." (*Kaulick, supra,* at p. 1303.) *Kaulick* explained:

> "The maximum sentence to which Kaulick, and those similarly situated to him, is subject was, and shall always be, the indeterminate life term to which he was originally sentenced. While [the Act] presents him with an opportunity to be resentenced to a lesser term, unless certain facts are established, he is nonetheless still subject to the third strike sentence based on the facts established at the time he was originally sentenced. As such, a court's discretionary decision to decline to modify the sentence in his favor can be based on any otherwise appropriate factor (i.e., dangerousness), and such factor need not be established by proof beyond a reasonable doubt to a jury." (*Ibid.*)

In *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1059-1062 (*Blakely*), we rejected the claim an inmate seeking resentencing pursuant to section 1170.126 has a Sixth Amendment right to a jury determination, beyond a reasonable doubt, on the question of conduct constituting a disqualifying factor. We concluded that *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and its progeny (e.g., *Alleyne v. United States* (2013) 570 U.S. ___ [133 S.Ct. 2151]; *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*); *Blakely v. Washington* (2004) 542 U.S. 296) "do not apply to a determination of eligibility for resentencing under the Act." (*Blakely, supra,* 225 Cal.App.4th at p. 1060.) We also relied heavily on *Kaulick.*

In rejecting application of the beyond a reasonable doubt standard, *Kaulick* discussed the United States Supreme Court's conclusion in *Dillon v. United States* (2010) 560 U.S. 817, 828 (*Dillon*), that "a defendant's Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt do not apply to limits on downward sentence modifications due to intervening laws." (*Kaulick, supra,* 215 Cal.App.4th at p. 1304.) *Kaulick* found *Dillon*'s language applicable. Since the retrospective part of the Act is not constitutionally required, but an act of lenity on the part of the electorate and provides for a proceeding where the original sentence may be modified downward, any facts found at such a proceeding, such as dangerousness, do not implicate Sixth

Amendment issues. Thus, there is no constitutional requirement that the facts be established beyond a reasonable doubt. (*Kaulick, supra*, at pp. 1304-1305.)[12]

Although in *Blakely*, we applied *Kaulick*'s analysis to the initial determination of eligibility for resentencing under the Act (*Blakely, supra*, 225 Cal.App.4th at p. 1061), it applies equally to the issue whether resentencing the petitioner would pose an unreasonable risk of danger to public safety. A denial of an inmate's petition does not increase the penalty to which that inmate is already subject, but instead removes the inmate from the scope of an act of lenity on the part of the electorate to which he or she is not constitutionally entitled. (*Id.* at p. 1062.) That the denial is based on a determination of dangerousness does not change that conclusion.

Kaulick found the prosecution bears the burden of establishing "dangerousness" by a preponderance of the evidence against a claim the *Apprendi* line of cases requires proof beyond a reasonable doubt. (*Kaulick, supra*, 215 Cal.App.4th at pp. 1301-1302.) As a result, it had no real occasion to address the interplay between the burden of proof and the trial court's exercise of discretion as that issue is presented here, or to clarify whether the prosecution is required to establish "dangerousness" in the sense of *facts* upon which the trial court can base the ultimate determination resentencing a petitioner would pose an unreasonable risk of danger to public safety, or in the sense of establishing that determination itself.[13] Nevertheless, we believe it supports our interpretation.

---

12 *Pepper v. United States* (2011) 562 U.S. 476 does not undermine *Dillon* or *Kaulick*'s reliance thereon. Unlike *Dillon*, *Pepper* involved a plenary resentencing after the defendant's sentence had been set aside on appeal. (*Pepper, supra*, 562 U.S. at p. 481.)

13 As noted, *ante*, we have previously discussed *Kaulick* in the context of the initial determination whether an inmate is eligible for resentencing under the Act. (*Blakely, supra*, 225 Cal.App.4th at pp. 1058, 1060-1061; *People v. Osuna, supra*, 225 Cal.App.4th at pp. 1033, 1039-1040.) Nothing we say here should be taken as disagreement with those opinions. We deal here with a different aspect of the retrospective portion of the Act and a subject not before us in our prior cases.

Accordingly, we hold preponderance of the evidence is the applicable standard of proof, regardless whether we analyze the issue as one of Sixth Amendment jurisprudence, due process, or equal protection. (*People v. Flores, supra,* 227 Cal.App.4th at p. 1076.)[14]

This does not, however, mean the trial court must apply that standard in making its ultimate determination whether to resentence a petitioner, or we must review that determination for substantial evidence.[15] Nor does it mean evidence of dangerousness must preponderate over evidence of rehabilitation for resentencing to be denied.

The language of section 1170.126, subdivision (f) expressly provides the petitioner shall be resentenced unless the court, in its discretion, makes a determination that resentencing would pose an unreasonable risk of danger. The statute does not say the petitioner shall be resentenced unless the People prove resentencing would pose such a risk.

---

[14] We recognize that in the case of people who are involuntarily committed as narcotics addicts or for analogous reasons, the California Supreme Court has found the appropriate standard of proof to be beyond a reasonable doubt. (See, e.g., *People v. Thomas* (1977) 19 Cal.3d 630, 637-638.) Defendant received the protections of that standard of proof (and the right to a jury trial) at the time he was found to have suffered his prior strike convictions, however. (*People v. Nguyen* (2009) 46 Cal.4th 1007, 1015; *People v. Towers* (2007) 150 Cal.App.4th 1273, 1277.)

We reject defendant's claim due process requires at least a clear and convincing evidence standard. The cases cited by defendant do not address situations analogous to the act of lenity contained in section 1170.126.

[15] The substantial evidence test applies to an appellate court's review of findings made under the preponderance of the evidence standard. (*People v. Wong* (2010) 186 Cal.App.4th 1433, 1444.) Under that test, the appellate court reviews the record in the light most favorable to the challenged finding, to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could make the finding by a preponderance of the evidence. The appellate court "resolve[s] all conflicts in the evidence and questions of credibility in favor of the [finding], and … indulge[s] every reasonable inference the [trier of fact] could draw from the evidence. [Citation.]" (*Ibid.*)

Considering the language of subdivisions (f) and (g) of section 1170.126, we conclude the People have the burden of establishing, by a preponderance of the evidence, facts from which a determination resentencing the petitioner would pose an unreasonable risk of danger to public safety can reasonably be made. The reasons a trial court finds resentencing would pose an unreasonable risk of danger, or its weighing of evidence showing dangerousness versus evidence showing rehabilitation, lie within the court's discretion. The ultimate determination that resentencing would pose an unreasonable risk of danger is a discretionary one. While the determination must be supported by facts established by a preponderance, the trial court need not itself find an unreasonable risk of danger by a preponderance of the evidence. (See *In re Robert L.*, *supra*, 21 Cal.App.4th at pp. 1065-1067 [discussing abuse of discretion and preponderance of the evidence standards].)

Such an interpretation is consistent with California's noncapital sentencing scheme.[16] Under the determinate sentencing law (DSL) as it existed prior to *Cunningham*, "three terms of imprisonment [were] specified by statute for most offenses. The trial court's discretion in selecting among [those] options [was] limited by section 1170, subdivision (b), which direct[ed] that 'the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.'" (*People v. Black* (2007) 41 Cal.4th 799, 808, fn. omitted.) Trial courts had "broad discretion" to impose the lower or upper term instead of the middle term of imprisonment (*People v. Scott* (1994) 9 Cal.4th 331, 349), and generally were required by the statutes and sentencing rules to state reasons for their discretionary sentencing choices

---

16 The determination of the appropriate penalty in a capital case "'is "essentially moral and normative …, and therefore … there is no burden of proof or burden of persuasion. [Citation.]" [Citation.]' [Citations.]" (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1362, disapproved on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

(*ibid*.). Such reasons had to be "supported by a preponderance of the evidence in the record" and reasonably related to the particular sentencing determination. (*Ibid*.; see former Cal. Rules of Court, rule 4.420(b).) Even after the DSL was reformed and amended in response to *Cunningham*, so as to eliminate judicial factfinding in selection of the appropriate term when three possible prison terms are specified by statute, establishment of facts by a preponderance of the evidence remains necessary with respect to certain discretionary sentencing decisions. (See *In re Coley* (2012) 55 Cal.4th 524, 557-558.)[17]

In *People v. Sandoval* (2007) 41 Cal.4th 825, 850-851, the California Supreme Court stated that, in making its discretionary sentencing choices post-*Cunningham*, "the trial court need only 'state [its] reasons' [citation]; it is not required to identify aggravating and mitigating factors, *apply a preponderance of the evidence standard*, or specify the 'ultimate facts' that 'justify[] the term selected.' [Citations.] Rather, the court must 'state in simple language the primary factor or factors that support the exercise of discretion.' [Citation.]" (Italics added.)

The trial court's ultimate determination when considering a petition for resentencing under section 1170.126 is analogous to an evaluation of the relative weight of mitigating and aggravating circumstances. Such an evaluation "is not equivalent to a factual finding." (*People v. Black*, *supra*, 41 Cal.4th at p. 814, fn. 4.) It follows, then, that the trial court need not apply a preponderance of the evidence standard, in that it need not find resentencing the petitioner would, more likely than not, pose an

---

17 After *Cunningham* concluded the DSL violated a defendant's Sixth Amendment right to a jury trial (*Cunningham*, *supra*, 549 U.S. at p. 281), the Legislature amended section 1170 so that now "(1) the middle term is no longer the presumptive term absent aggravating or mitigating facts found by the trial judge; and (2) a trial judge has the discretion to impose an upper, middle or lower term based on reasons he or she states." (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992.) Subdivision (b) of section 1170 states the court "shall select the term which, in the court's discretion, best serves the interests of justice."

unreasonable risk of danger to public safety. (See *Kaulick, supra,* 215 Cal.App.4th at p. 1305, fn. 28 [preponderance standard means "'more likely than not'"].)

To summarize, a trial court need not determine, by a preponderance of the evidence, that resentencing a petitioner would pose an unreasonable risk of danger to public safety before it can properly deny a petition for resentencing under the Act. Nor is the court's ultimate determination subject to substantial evidence review. Rather, its finding will be upheld if it does not constitute an abuse of discretion, i.e., if it falls within "the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) The facts or evidence upon which the court's finding of unreasonable risk is based must be proven by the People by a preponderance of the evidence, however, and are themselves subject to our review for substantial evidence.[18] If a factor (for example, that the petitioner recently committed a battery, is violent due to repeated instances of mutual combat, etc.) is not established by a preponderance of the evidence, it cannot form the basis for a finding of unreasonable risk. (See *People v. Cluff* (2001) 87 Cal.App.4th 991, 998 [trial court abuses its discretion when factual findings critical to decision find no support in record]; cf. *People v. Read* (1990) 221 Cal.App.3d 685, 689-691 [where trial court erroneously determined defendant was statutorily ineligible for probation, reviewing court was required to determine whether trial court gave sufficient other reasons, supported by facts of case, for probation denial].)

C. SECTION 1170.126 DOES NOT ESTABLISH OR CONTAIN A PRESUMPTION A PETITIONER'S SENTENCE BE REDUCED.

Relying on *People v. Guinn* (1994) 28 Cal.App.4th 1130, 1141-1142 and its progeny (e.g., *People v. Murray* (2012) 203 Cal.App.4th 277, 282; *People v. Blackwell*

---

[18] "Substantial evidence," not the significantly more deferential "some evidence" standard applicable to review of executive branch decisions in parole cases (see *In re Rosenkrantz* (2002) 29 Cal.4th 616, 658, 665), is the appropriate appellate standard.

(2011) 202 Cal.App.4th 144 (*Blackwell*); *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1089), all of which deal with section 190.5, subdivision (b),[19] defendant contends the "shall"/"unless" formulation employed in subdivision (f) of section 1170.126 has reduced the presumptive sentence for a qualified petitioner to a "'two-strike' sentence."

The California Supreme Court recently disapproved the cases relied on by defendant. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1370, 1387.)[20] Leaving aside constitutional questions raised by establishing a presumption in favor of life without parole for juveniles after the United States Supreme Court's opinion in *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455], the state high court's review of the text of section 190.5, subdivision (b) led it to conclude the syntax is ambiguous concerning any presumption. The court stated: "It is not unreasonable to read this text … to mean that a court 'shall' impose life without parole unless 'at the discretion of the court' a sentence of 25 years to life appears more appropriate. [Citation.] But it is equally reasonable to read the text to mean that a court may select one of the two penalties in the exercise of its discretion, with no presumption in favor of one or the other. The latter reading accords with common usage. For example, if a teacher informed her students that 'you must take a final exam or, at your discretion, write a term paper,' it would be reasonable for the students to believe they were equally free to pursue either option. The text of section 190.5[, subdivision](b) does not clearly indicate whether the statute was intended to make life without parole the presumptive sentence." (*People v. Gutierrez*, *supra*, 58 Cal.4th at p. 1371.)

---

19 Section 190.5, subdivision (b) provides, in pertinent part: "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances … has been found to be true …, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life."

20 In addition, the United States Supreme Court granted certiorari, and vacated the judgment, in *Blackwell*. (*Blackwell v. California* (2013) 568 U.S. ___ [133 S.Ct. 837].)

The same example can be applied to the syntax of section 1170.126, subdivision (f). Thus, we do not agree with defendant that resentencing to a second strike term "is the 'presumptive' disposition [and that] only 'circumscribed' discretion to adopt the more severe third-strike sentence is conferred." A court considering whether to resentence an eligible petitioner under section 1170.126, subdivision (f) has circumscribed discretion in the sense it can only refuse to resentence if it finds that to do so would pose an unreasonable risk of danger to public safety on the facts of the particular case before it. This does not mean, however, its discretion is circumscribed in the sense it can only find dangerousness in rare or extraordinary cases. To the contrary, it can do so in any case in which such a finding is rational under the totality of the circumstances.

Such a conclusion comports with the plain language of the statute. Moreover, a conclusion the "shall"/"unless" construction of section 1170.126, subdivision (f) establishes a "strong presumption" in favor of resentencing, as defendant asserts, would run directly contrary to the intent of the voters in passing the Act. (See *People v. Gutierrez*, *supra*, 58 Cal.4th at pp. 1371-1372 [examining legislative history and voter intent in attempt to resolve statutory ambiguity].) As we stated in *People v. Osuna*, *supra*, 225 Cal.App.4th at page 1036, "'[e]nhancing public safety was a key purpose of the Act' [citation]." Thus, although one purpose of the Act was to save taxpayer dollars (*People v. Osuna*, *supra*, at p. 1037), "[i]t is clear the electorate's intent was not to throw open the prison doors to *all* third strike offenders whose current convictions were not for serious or violent felonies, but *only* to those who were perceived as nondangerous or posing little or no risk to the public." (*Id*. at p. 1038, second italics added.) Had voters intended to permit retention of an indeterminate term only in extraordinary cases, they would have said so in subdivision (f) of section 1170.126, rather than employing language that affords courts broad discretion to find dangerousness. They also would not

have afforded the trial court the power to consider any evidence it determined to be relevant to the issue as they did in subdivision (g)(3) of the statute.[21]

D. THE FOCUS IN A SECTION 1170.126, SUBDIVISION (F) ANALYSIS IS ON WHETHER PETITIONER *CURRENTLY* POSES AN UNREASONABLE RISK OF DANGER TO PUBLIC SAFETY.

In discussing the "some evidence" standard applicable in parole cases, the California Supreme Court has stated: "'[D]ue consideration' of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision — the determination of current dangerousness." (*In re Lawrence, supra,* 44 Cal.4th at p. 1210.) Citing parole cases, defendant contends a "rational nexus" must exist "between the evidence and the trial court's determination of current unreasonable dangerousness," before resentencing can be denied under the Act.

Although we decline to decide how and to what extent parole cases inform the decision whether to resentence a petitioner under the Act or our review of such a decision, we agree with defendant that the proper focus is on whether the petitioner *currently* poses an unreasonable risk of danger to public safety. (Cf. *In re Shaputis* (2008) 44 Cal.4th 1241, 1254; *In re Lawrence, supra,* 44 Cal.4th at p. 1214.) A trial court may properly deny resentencing under the Act based solely on immutable facts such as a petitioner's criminal history "*only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. [Citation.]" (*In re*

---

21 Although the "ARGUMENT IN FAVOR OF PROPOSITION 36" stated the measure had been "carefully crafted … so that truly dangerous criminals" would receive no benefits from the Act (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) argument in favor of Prop. 36, p. 52), it did not suggest dangerousness would properly be found only in rare cases. Rather, the statutory language and ballot materials suggest voters intended resentencing would be denied in any case in which it would pose an unreasonable risk of danger to public safety, and they entrusted to their local judges the discretion to make that determination.

Lawrence, supra, at p. 1221.) "[T]he relevant inquiry is whether [a petitioner's prior criminal and/or disciplinary history], when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years [later]. This inquiry is … an individualized one, and cannot be undertaken simply by examining the circumstances of [the petitioner's criminal history] in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude. [Citation.]' [Citation.]" (*In re Shaputis, supra,* 44 Cal.4th at pp. 1254-1255.)

E. SECTION 1170.18, SUBDIVISION (C), ENACTED PURSUANT TO PROPOSITION 47, DOES NOT MODIFY SECTION 1170.126, SUBDIVISION (F).

On November 4, 2014, voters enacted Proposition 47, "the Safe Neighborhoods and Schools Act" (hereafter Proposition 47). It went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).) Insofar as is pertinent here, Proposition 47 renders misdemeanors certain drug- and theft-related offenses that previously were felonies or "wobblers," unless they were committed by certain ineligible defendants. Proposition 47 also created a new resentencing provision — section 1170.18 — by which a person currently serving a felony sentence for an offense that is now a misdemeanor, may petition for a recall of that sentence and request resentencing in accordance with the offense statutes as added or amended by Proposition 47. (§ 1170.18, subd. (a).) A person who satisfies the criteria in subdivision (a) of section 1170.18 shall have his or her sentence recalled and be "resentenced to a misdemeanor … unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (*Id.*, subd. (b).)[22]

Hidden in the lengthy, fairly abstruse text of the proposed law, as presented in the official ballot pamphlet — and nowhere called to voters' attention — is the provision at

---

[22] Proposition 47 also created a process whereby eligible persons who have already completed their sentences may have the particular conviction or convictions designated as misdemeanors. (§ 1170.18, subds. (f), (g).)

issue in the present appeal. Subdivision (c) of section 1170.18 provides: "As used throughout this Code, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." Section 667, subdivision (e)(2)(C)(iv) lists so-called "super strike" offenses.[23]

The question is whether section 1170.18, subdivision (c) now limits a trial court's discretion to deny resentencing under the Act to those cases in which resentencing the defendant would pose an unreasonable risk he or she will commit a new "super strike" offense. Defendant says it does. The People disagree. We agree with the People.[24]

"'In interpreting a voter initiative …, we apply the same principles that govern statutory construction. [Citation.]' [Citation.] '"The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]"' [Citation.]" (*People v. Superior Court* (*Cervantes*) (2014) 225

---

[23] As set out in subdivision (e)(2)(C)(iv) of section 667, those felonies are: "(I) A 'sexually violent offense' as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code. [¶] (II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289. [¶] (III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288. [¶] (IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive. [¶] (V) Solicitation to commit murder as defined in Section 653f. [¶] (VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245. [¶] (VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418. [¶] (VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death."

[24] We permitted the parties to file supplemental briefing concerning Proposition 47. Defendant concedes his conviction for violating section 4573.6 is not listed as eligible for reduction to a misdemeanor.

Cal.App.4th 1007, 1014.) Thus, in the case of a provision adopted by the voters, "their intent governs. [Citations.]" (*People v. Jones* (1993) 5 Cal.4th 1142, 1146.)

To determine intent, "'we look first to the words themselves. [Citations.]'" (*People v. Superior Court* (*Cervantes*), *supra*, 225 Cal.App.4th at p. 1014.) We give the statute's words "'a plain and commonsense meaning. [Citation.] We do not, however, consider the statutory language "in isolation." [Citation.] Rather, we look to "the entire substance of the statute … in order to determine the scope and purpose of the provision …. [Citation.]" [Citation.] That is, we construe the words in question "'in context, keeping in mind the nature and obvious purpose of the statute ….' [Citation.]" [Citation.] We must harmonize "the various parts of a statutory enactment … by considering the particular clause or section on the context of the statutory framework as a whole." [Citations.]' [Citation.]" (*People v. Acosta* (2002) 29 Cal.4th 105, 112.) We "accord[] significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided.… [S]tatutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.]" (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.)

"'"'When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it." [Citation.]' [Citation.]" (*People v. Hendrix* (1997) 16 Cal.4th 508, 512.) On its face, "[a]s used throughout this Code," as employed in section 1170.18, subdivision (c), clearly and unambiguously refers to the Penal Code, not merely section 1170.18 or the other provisions contained in Proposition 47. (See *People v. Bucchierre* (1943) 57 Cal.App.2d 153, 164-165, 166; see also *Marshall v. Pasadena Unified School Dist.* (2004) 119 Cal.App.4th 1241, 1254-1255; *People v. Vasquez* (1992) 7 Cal.App.4th 763, 766.)

This does not mean, however, that the definition contained in section 1170.18, subdivision (c) must inexorably be read into section 1170.126, subdivision (f). (Cf.

Marshall v. Pasadena Unified School Dist., *supra*, 119 Cal.App.4th at p. 1255.) "The literal language of a statute does not prevail if it conflicts with the lawmakers' intent …. [Citations.]" (*People v. Osuna*, *supra*, 225 Cal.App.4th at pp. 1033-1034.) "'The apparent purpose of a statute will not be sacrificed to a literal construction.' [Citation.]" (*Cossack v. City of Los Angeles* (1974) 11 Cal.3d 726, 733.) Rather, "the literal meaning of a statute must be in accord with its purpose." (*People v. Mohammed* (2008) 162 Cal.App.4th 920, 927.) "[I]t is settled that the language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the [voters] did not intend" (*In re Michele D.* (2002) 29 Cal.4th 600, 606), or would "frustrate[] the manifest purposes of the legislation as a whole …." (*People v. Williams* (1992) 10 Cal.App.4th 1389, 1393.) "To this extent, therefore, intent prevails over the letter of the law and the letter will be read in accordance with the spirit of the enactment. [Citation.]" (*In re Michele D.*, *supra*, 29 Cal.4th at p. 606; accord, *People v. Ledesma* (1997) 16 Cal.4th 90, 95.)

Thus, "'we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, …, and the statutory scheme of which the statute is a part. [Citations.]' [Citation.] We also '"refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." [Citation.]' [Citation.]" (*People v. Osuna*, *supra*, 225 Cal.App.4th at p. 1034.) We consider "the consequences that will flow from a particular interpretation" (*Dyna-Med, Inc. v. Fair Employment & Housing Com.*, *supra*, 43 Cal.3d at p. 1387), as well as "the wider historical circumstances" of the statute's or statutes' enactment (*ibid*.). "'Using these extrinsic aids, we "select the construction that comports most closely with the apparent intent of the [electorate], with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." [Citation.]' [Citation.]" (*People v. Osuna*, *supra*, 225 Cal.App.4th at pp. 1034-1035.)

Proposition 47 and the Act address related, but not identical, subjects. As we explain, reading them together, and considering section 1170.18, subdivision (c) in the context of the statutory framework as a whole (see *People v. Acosta*, *supra*, 29 Cal.4th at p. 112; *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 658-659; *In re Cindy B.* (1987) 192 Cal.App.3d 771, 781), we conclude its literal meaning does not comport with the purpose of the Act, and applying it to resentencing proceedings under the Act would frustrate, rather than promote, that purpose and the intent of the electorate in enacting both initiative measures (see *People v. Disibio* (1992) 7 Cal.App.4th Supp. 1, 5).

As is evidenced by its title, the Act was aimed solely at revising the three strikes law. That law, as originally enacted by the Legislature, was described by us as follows:

> "Under the three strikes law, defendants are punished not just for their current offense but for their recidivism. Recidivism in the commission of multiple felonies poses a danger to society justifying the imposition of longer sentences for subsequent offenses. [Citation.] The primary goals of recidivist statutes are: '… to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.' [Citation.]
>
> "By enacting the three strikes law, the Legislature acknowledged the will of Californians that the goals of retribution, deterrence, and incapacitation be given precedence in determining the appropriate punishment for crimes. Further, those goals were best achieved by ensuring 'longer prison sentences and greater punishment' for second and

third 'strikers.'" (*People v. Cooper* (1996) 43 Cal.App.4th 815, 823-824.)[25]

A few months before the November 6, 2012, election, the California Supreme Court observed: "One aspect of the [three strikes] law that has proven controversial is that the lengthy punishment prescribed by the law may be imposed not only when … a defendant [who has previously been convicted of one or more serious or violent felonies] is convicted of another serious or violent felony but also when he or she is convicted of any offense that is categorized under California law as a felony. This is so even when the current, so-called triggering, offense is nonviolent and may be widely perceived as relatively minor. [Citations.]" (*In re Coley*, *supra*, 55 Cal.4th at pp. 528-529.)

Clearly, by approving the Act, voters resolved this controversy in favor of strike offenders. Thus, one of the "Findings and Declarations" of the Act stated the Act would "[r]estore the Three Strikes law to the public's original understanding by requiring life sentences only when a defendant's current conviction is for a violent or serious crime." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012), *supra*, text of proposed law, § 1, p. 105.) As we previously observed, however, nowhere do the ballot materials for the Act suggest voters intended essentially to open the prison doors to existing third strike offenders in all but the most egregious cases. Yet, that is precisely the result that would ensue should the definition of "'unreasonable risk of danger to public safety'" contained in section 1170.18, subdivision (c) be engrafted onto resentencing proceedings under section 1170.126, subdivision (f). That voters did *not* intend such a result is amply demonstrated by the fact an indeterminate life term remains mandatory under the Act for

---

25 The foregoing applies equally to the three strikes initiative measure that added section 1170.12 to the Penal Code. The following statement of intent preceded the text of the statute in Proposition 184, which was approved by voters on November 8, 1994: "'It is the intent of the People of the State of California in enacting this measure to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.'" (See Historical and Statutory Notes, 50C West's Ann. Pen. Code (2015 ed.) foll. § 1170.12, p. 376.)

a wide range of current offenses even if the offender does not have a prior conviction for a "super strike" offense (§§ 667, subd. (e)(2), 1170.12, subd. (c)(2)), and that an inmate is rendered ineligible for resentencing under section 1170.126 for an array of reasons beyond his or her having suffered such a prior conviction (§ 1170.126, subd. (e)(2)).

The Act clearly placed public safety above the cost savings likely to accrue as a result of its enactment. Thus, uncodified section 7 of the Act provides: "This act is an exercise of the public power of the people of the State of California *for the protection of the health, safety, and welfare of the people of the State of California*, and shall be liberally construed to effectuate those purposes." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012), *supra*, text of proposed law, p. 110, original italics omitted, italics added.) As we explained in *People v. Osuna*, *supra*, 225 Cal.App.4th at page 1036, "Although the Act 'diluted' the three strikes law somewhat [citation], '[e]nhancing public safety was a key purpose of the Act' [citation]."

In contrast, Proposition 47 — while titled "the Safe Neighborhoods and Schools Act" — emphasized monetary savings. The "Findings and Declarations" stated: "The people of the State of California find and declare as follows: [¶] The people enact the Safe Neighborhoods and Schools Act to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment. This act ensures that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of proposed law, § 2, p. 70.) Uncodified section 15 of the measure provides: "This act shall be broadly construed to accomplish its purposes," while uncodified section 18 states: "This act shall be liberally construed to effectuate its purposes." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), *supra*, text of proposed law, p. 74.) Proposition 47 requires misdemeanor sentences for various drug possession and property

offenses, unless the perpetrator has a prior conviction for a "super strike" offense or for an offense requiring sex offender registration pursuant to section 290, subdivision (c). (Health & Saf. Code, §§ 11350, subd. (a), 11357, subd. (a), 11377, subd. (a); §§ 459.5, subd. (a), 473, subd. (b), 476a, subd. (b), 490.2, subd. (a), 496, subd. (a), 666, subd. (b).) Section 1170.18 renders ineligible for resentencing *only* those inmates whose current offense would now be a misdemeanor, but who have a prior conviction for a "super strike" offense or for an offense requiring sex offender registration pursuant to section 290, subdivision (c). (§ 1170.18, subds. (a), (i).)

Nowhere in the ballot materials for Proposition 47 were voters given any indication that initiative, which dealt with offenders whose current convictions would now be misdemeanors rather than felonies, had any impact on the Act, which dealt with offenders whose current convictions *would still be felonies*, albeit not third strikes. For instance, the Official Title and Summary stated, in pertinent part, that Proposition 47 would "[r]equire[] resentencing for persons serving felony sentences for these offenses[, i.e., offenses that require misdemeanor sentences under the measure] unless court finds unreasonable public safety risk." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), *supra*, official title and summary, p. 34.) In explaining what Proposition 47 would do, the Legislative Analyst stated: "This measure reduces penalties for certain offenders convicted of *nonserious and nonviolent property and drug crimes*. This measure also allows certain offenders *who have been previously convicted of such crimes* to apply for reduced sentences." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), *supra*, analysis of Prop. 47 by Legis. Analyst, p. 35, italics added.) With respect to the resentencing provision, the Legislative Analyst explained:

> "This measure allows offenders *currently serving felony sentences for the above crimes*[, i.e., grand theft, shoplifting, receiving stolen property, writing bad checks, check forgery, and drug possession] to apply to have their felony sentences reduced to misdemeanor sentences. In addition, certain offenders who have already completed a sentence for a

> felony that the measure changes could apply to the court to have their felony conviction changed to a misdemeanor. However, no offender who has committed a specified severe crime could be resentenced or have their conviction changed. In addition, the measure states that a court is not required to resentence an offender currently serving a felony sentence if the court finds it likely that the offender will commit a specified severe crime. Offenders who are resentenced would be required to be on state parole for one year, unless the judge chooses to remove that requirement." (*Id*. at p. 36, italics added.)

Similarly, the arguments in favor of and against Proposition 47 spoke in terms solely of Proposition 47, and never mentioned the Act. The Argument in Favor of Proposition 47 spoke in terms of prioritizing serious and violent crime so as to stop wasting prison space "on petty crimes," stop "wasting money on warehousing people in prisons for nonviolent petty crimes," and stop California's overcrowded prisons from "incarcerating too many people convicted of low-level, nonviolent offenses." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), *supra*, argument in favor of Prop. 47, p. 38.) The Rebuttal to Argument Against Proposition 47 reiterated these themes, and never suggested Proposition 47 would have any effect on resentencing under the Act. (See Voter Information Guide, Gen. Elec. (Nov. 4, 2014), *supra*, rebuttal to argument against Prop. 47, p. 39.) Although the Rebuttal to Argument in Favor of Proposition 47 asserted 10,000 inmates would be eligible for early release under the measure, and that many of them had prior convictions "for serious crimes, such as assault, robbery and home burglary" (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), *supra*, rebuttal to argument in favor of Prop. 47, p. 38), there is no suggestion the early release provisions would extend to inmates whose current offenses remained felonies under the Act. The same is true of the discussion of resentencing contained in the Argument Against Proposition 47. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), *supra*, argument against Prop. 47, p. 39.)

In light of the foregoing, we cannot reasonably conclude voters intended the definition of "'unreasonable risk of danger to public safety'" contained in

section 1170.18, subdivision (c) to apply to that phrase as it appears in section 1170.126, subdivision (f), despite the former section's preamble, "As used throughout this Code …." Voters cannot intend something of which they are unaware.

We are cognizant one of the Act's authors has taken the position Proposition 47's definition of "unreasonable risk of danger" applies to resentencing proceedings under the Act. (St. John & Gerber, *Prop. 47 Jolts Landscape of California Justice System* (Nov. 5, 2014) Los Angeles Times <http://www.latimes.com/local/politics/la-me-ff-pol-proposition47-20141106-story.html> [as of Oct. 21, 2015].) Looking at the information conveyed to voters, however, this clearly was not *their* intent and so an author's desire is of no import. (Cf. *People v. Garcia* (2002) 28 Cal.4th 1166, 1175-1176, fn. 5; *People v. Bradley* (2012) 208 Cal.App.4th 64, 83; *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 30.)

We are also mindful "it has long been settled that '[t]he enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted' [citation], 'and to have enacted or amended a statute in light thereof' [citation]. 'This principle applies to legislation enacted by initiative. [Citation.]' [Citation.]" (*People v. Superior Court* (*Cervantes*), *supra*, 225 Cal.App.4th at p. 1015; accord, *In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11.) Thus, we presume voters were aware "unreasonable risk of danger to public safety," as used in section 1170.126, subdivision (f), had been judicially construed as not being impermissibly vague, but as nevertheless having no fixed definition. (*People v. Garcia* (2014) 230 Cal.App.4th 763, 769-770; *People v. Flores*, *supra*, 227 Cal.App.4th at p. 1075.) Because nowhere in the ballot materials for Proposition 47 was it called to voters' attention the definition of the phrase contained in section 1170.18, subdivision (c) would apply to resentencing proceedings under the Act, we simply cannot conclude voters intended Proposition 47 to alter the Act in that respect. Voters are not asked or presumed to be able to discern all potential effects of a proposed initiative measure; this is why they are provided with voter

information guides containing not only the actual text of such a measure, but also a neutral explanation and analysis by the Legislative Analyst and arguments in support of and in opposition to the measure. As we have already observed, none of those materials so much as hinted that Proposition 47 could have the slightest effect on resentencing under the Act. (Cf. *Marshall v. Pasadena Unified School Dist., supra,* 119 Cal.App.4th at pp. 1255-1256 [legislative history of enactment included information bill would add definition of particular term to Public Contract Code].)[26]

Nor can we infer an intent to extend section 1170.18, subdivision (c)'s definition to proceedings under section 1170.126 because the phrase in question only appears in those sections of the Penal Code. The only resentencing mentioned in the Proposition 47 ballot materials was resentencing for inmates whose current offenses would be reduced to *misdemeanors*, not those who would still warrant *second strike felony terms*. There is a huge difference, both legally and in public safety risked, between someone with multiple prior serious and/or violent felony convictions whose current offense is (or would be, if committed today) a misdemeanor, and someone whose current offense is a felony. Accordingly, treating the two groups differently for resentencing purposes does not lead to absurd results, but rather is eminently logical.

We recognize "[i]t is an established rule of statutory construction … that when statutes are *in pari materia* similar phrases appearing in each should be given like meanings. [Citations.]" (*People v. Caudillo* (1978) 21 Cal.3d 562, 585, overruled on another ground in *People v. Martinez* (1999) 20 Cal.4th 225, 229, 237, fn. 6 & disapproved on another ground in *People v. Escobar* (1992) 3 Cal.4th 740, 749-751 &

---

26 For the same reasons, we reject the notion the definition contained in section 1170.18, subdivision (c) was intended to clarify the true meaning of "unreasonable risk of danger to public safety" as used in section 1170.126, subdivision (f). (Cf. *Re-Open Rambla, Inc. v. Board of Supervisors* (1995) 39 Cal.App.4th 1499, 1511; *In re Connie M.* (1986) 176 Cal.App.3d 1225, 1238.)

fn. 5; see *Robbins v. Omnibus R. Co.* (1867) 32 Cal. 472, 474.) We question whether Proposition 47 and the Act are truly in pari materia: That phrase means "[o]n the same subject; relating to the same matter" (Black's Law Dict. (9th ed. 2009) p. 862), and the two measures (albeit with some overlap) address different levels of offenses and offenders. In any event, "canons of statutory construction are merely aids to ascertaining probable legislative intent" (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 521, fn. 10); they are "mere guides and will not be applied so as to defeat the underlying legislative intent otherwise determined [citation]" (*Dyna-Med, Inc. v. Fair Employment & Housing Com.*, *supra*, 43 Cal.3d at p. 1391).

The Act was intended to reform the three strikes law while keeping intact that scheme's core commitment to public safety. Allowing trial courts broad discretion to determine whether resentencing an eligible petitioner under the Act "would pose an unreasonable risk of danger to public safety" (§ 1170.126, subd. (f)) clearly furthers the Act's purpose. Whatever the wisdom of Proposition 47's policy of near-universal resentencing where *misdemeanants* are concerned — and "[i]t is not for us to gainsay the wisdom of this legislative choice" (*Bernard v. Foley* (2006) 39 Cal.4th 794, 813) — constraining that discretion so that all but the worst *felony* offenders are released manifestly does not, nor does it comport with voters' intent in enacting either measure.

Accordingly, Proposition 47 has no effect on defendant's petition for resentencing under the Act. Defendant is not entitled to a remand so the trial court can redetermine defendant's entitlement to resentencing under the Act utilizing the definition of

"'unreasonable risk of danger to public safety'" contained in section 1170.18, subdivision (c).[27]

II

The Trial Court's Ruling

Applying the foregoing principles, we conclude defendant has not borne his burden on appeal of establishing the trial court's ruling exceeded the bounds of reason. The evidence before the court clearly showed defendant had a longstanding, significant drug problem that showed no abatement, and for which he sought no help, during the majority of his lengthy time in prison. Although he was participating in a 12-step recovery program at the time his petition was filed, he had only completed the first three steps, and did not even contact the chaplains running the program until October 2012, approximately two months before he filed his petition for resentencing. His CDC 115 rules violations were voluminous and included instances of violence, and, it can reasonably be inferred, continued until he began to hear about possible changes in the three strikes law for inmates whose third strike was a nonviolent offense. Even when seeking treatment for depression, he was — by his own admission — manipulative in certain respects. It is not unreasonable to conclude defendant's purported desire to change his life was another form of manipulation, in the sense that he did not begin taking any steps toward rehabilitation until the possibility of resentencing loomed.

---

[27] Were we to conclude section 1170.18, subdivision (c) modifies section 1170.126, subdivision (f), we would further conclude it does not do so retroactively. We believe a finding of nonretroactivity inexorably leads to the possibility of prospective-only application, and prospective-only application of Proposition 47's definition to resentencing petitions under the Act would raise serious equal protection issues. "Mindful of the serious constitutional questions that might arise were we to accept a literal construction of the statutory language, and of our obligation wherever possible both to carry out the intent of the electorate and to construe statutes so as to preserve their constitutionality [citations]" (*People v. Skinner* (1985) 39 Cal.3d 765, 769), we rest our holding on the reasoning set out in our opinion, *ante*.

Given the totality of the circumstances, the trial court acted reasonably in concluding resentencing defendant would pose an unreasonable risk of danger to public safety. Defendant reargues the information before the trial court, but the fact reasonable people might disagree does not mean discretion was abused.[28]

DISPOSITION

The judgment is affirmed.

_____
DETJEN, Acting P.J.

I CONCUR:

_____
SMITH, J.

---

[28] Defendant contends the trial court should not have considered unsubstantiated information in the confidential file for any reason. In its ruling, the court stated it had not relied on information in the confidential file, except for defendant's physical and mental health records. We take the court at its word and conclude defendant has failed to show improper information entered into the court's decision. (See *Gonzales v. Nork* (1978) 20 Cal.3d 500, 510.) It is apparent the court looked at the information in the confidential file to ensure nothing therein warranted a different decision. While we suspect defendant would claim the trial court acted correctly if the People were complaining about the trial court's consideration of confidential materials to *grant* the petition, the fact remains defendant has failed to establish prejudice, assuming he has shown error. (We have not reviewed or considered any of the confidential file on appeal, except for defendant's physical and mental health records.)

PEÑA, J.,

I concur in the judgment and the majority opinion with the exception of part I.E. I agree defendant Steven Garcia may not take advantage of Proposition 47's[1] newly enacted definition of "unreasonable risk of danger to public safety," as provided in Penal Code section 1170.18, subdivision (c) (1170.18(c)). I do so not because there is any ambiguity in the language used in section 1170.18(c) or the notion that the statute does not mean what it says, i.e., that the new definition applies "throughout this Code." Rather, in my view, there is no indication the electorate, in enacting section 1170.18(c), intended it to apply retroactively to resentencing determinations under Proposition 36, the Three Strikes Reform Act of 2012 (the Act).

I. After November 4, 2014, the definition of "unreasonable risk of danger" in Section 1170.18(c) applies throughout the Penal Code

Section 1170.18(c) provides: "As used throughout this Code, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667."

This section and subdivision were enacted on November 4, 2014, when California voters passed Proposition 47, long past the time of defendant's resentencing hearing. Unless the legislation was designed or intended to apply retroactively, the definition in section 1170.18(c) cannot apply to defendant. This is the only inquiry we must make to resolve the issue of whether the definition in section 1170.18(c) applies to defendant. However, the majority has opted to determine whether the new definition applies to any resentencing provisions under the Act, past, present, or future. I respectfully disagree with the majority's analysis and conclusion on this broader issue.

---

[1]The Safe Neighborhood and Schools Act (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014)).

> "'When construing a statute, we must "ascertain the intent of the Legislature so as to effectuate the purpose of the law."' [Citations.] '[W]e begin with the words of a statute and give these words their ordinary meaning.' [Citation.] 'If the statutory language is clear and unambiguous, then we need go no further.' [Citation.] If, however, the language supports more than one reasonable construction, we may consider 'a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.' [Citation.] Using these extrinsic aids, we 'select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]" (*People v. Sinohui* (2002) 28 Cal.4th 205, 211-212.)

Where the statutory language is so clear and unambiguous, there is no need for statutory construction or to resort to legislative materials or other outside sources. (*Quarterman v. Kefauver* (1997) 55 Cal.App.4th 1366, 1371.) Absent ambiguity, it is presumed the voters intend the meaning apparent on the face of an initiative measure, and the courts may not add to the statute or rewrite it to conform to a presumed intent not apparent in its language. (*People v. ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 301.)

In determining whether the words enacted here are unambiguous, we do not write on a blank slate. For example, in *Marshall v. Pasadena Unified School Dist.* (2004) 119 Cal.App.4th 1241, 1255, the court stated there "is nothing ambiguous about the phrase 'as used in this code.'" It held the definition of "Emergency, as used in this code" applied to the entire Public Contract Code, and it was not limited to a particular chapter, article, or division of that code. Also, in *People v. Bucchierre* (1943) 57 Cal.App.2d 153, 166, the court held: "The words 'as in this code provided' (Penal Code, § 182) refer to the Penal Code."

In a similar vein, the court in *People v. Leal* (2004) 33 Cal.4th 999, 1007-1008, applied the plain meaning rule as follows:

"The statutory language of the provision defining 'duress' in each of the rape statutes is clear and unambiguous. The definition of 'duress' in both the rape and spousal rape statutes begins with the phrase, 'As used in this section, "duress" means ….' (§§ 261, subd. (b), 262, subd. (c).) This clear language belies any legislative intent to apply the definitions of 'duress' in the rape and spousal rape statutes to any other sexual offenses.

"Starting from the premise that in 1990 the Legislature incorporated into the rape statute a definition of 'duress' that already was in use for other sexual offenses, defendant argues that the Legislature must have intended its 1993 amendment of the definition of 'duress' in the rape statute, and the incorporation of this new definition into the spousal rape statute, to apply as well to other sexual offenses that use the term 'duress.' Defendant observes: 'The legislative history does not suggest any rationale for why the Legislature would want its 1993 amendment of the definition of "duress" to apply only to rape so that it would have one meaning when the rape statutes use the phrase "force, violence, duress, menace, or fear of immediate and unlawful bodily injury" but another, much more expansive meaning when the identical phrase is used in the statutes defining sodomy, lewd acts on a child, oral copulation and foreign object rape.'

"But the Legislature was not required to set forth its reasons for providing a different definition of 'duress' for rape and spousal rape than has been used in other sexual offenses; it is clear that it did so. 'When "'statutory language is … clear and unambiguous there is no need for construction, and courts should not indulge in it.'" [Citations.] The plain meaning of words in a statute may be disregarded only when that meaning is "'repugnant to the general purview of the act,' or for some other compelling reason …." [Citations.]' [Citation.] As we said in an analogous situation: 'It is our task to construe, not to amend, the statute. "In the construction of a statute … the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted …." [Citation.] We may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used.' [Citation.]"

The majority pays lip service to the plain meaning rule and then ignores it. While acknowledging the language used is unambiguous, it nonetheless engages in statutory construction to determine whether the electorate really intended to say what it actually enacted. The end result is a rewriting of the statute so that it comports with the majority's

view of what the voters really intended. The majority has rewritten section 1170.18(c) so that it now states: "*As used in this section only*, 'unreasonable risk of danger to public safety' means …." The majority does so without providing a compelling reason to do so and without showing the plain language used has a "'meaning [that] is "'repugnant to the general purview of the act.'"'" (*People v. Leal, supra*, 33 Cal.4th at p. 1008.) Because the Act had not previously defined the phrase "unreasonable risk of danger to public safety," the definition in section 1170.18(c) cannot be repugnant or contradictory to the Act, nor does the majority claim the definition is repugnant to the general purview of Proposition 47. For these reasons, I respectfully disagree with the majority on this part of the opinion.

II. Section 1170.18(c) has no application to defendant's resentencing under the Act

I do concur in the result because there is nothing in Proposition 47 to indicate the definition enacted under section 1170.18(c) is to be applied retroactively to defendant under the Act.

I begin my analysis with section 3 of the Penal Code, which provides that "[n]o part of it is retroactive, unless expressly so declared." "Whether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent. When the Legislature has not made its intent on the matter clear," section 3 provides the default rule. (*People v. Brown* (2012) 54 Cal.4th 314, 319.) Proposition 47 is silent on the question of whether it applies retroactively to proceedings under the Act. The analysis of Proposition 47 by the legislative analyst and the arguments for and against Proposition 47 are also silent on this question. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) pp. 34-39.) Because the statute contains no express declaration that section 1170.18(c) applies retroactively to proceedings under the Act, and there is no clearly implied intent of retroactivity in the legislative history, the default rule applies.

Defendant cites *In re Estrada* (1965) 63 Cal.2d 740 to argue retroactive application.

In *Estrada*, the court stated:

> "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*In re Estrada, supra*, 63 Cal.2d at p. 745.)

Defendant argues that under the *Estrada* case, unless there is a "savings clause" providing for prospective application, a statute lessening punishment is presumed to apply to all cases not yet reduced to a final judgment on the statute's effective date. (*In re Estrada*, *supra*, 63 Cal.2d at pp. 744-745, 747-748.) However, the *Estrada* case has been revisited by our Supreme Court on several occasions. In *People v. Brown, supra*, 54 Cal.4th at page 324 the court stated: "*Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation codified in [Penal Code] section 3, but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments." "The holding in *Estrada* was founded on the premise that '"[a] legislative mitigation of the penalty *for a particular crime* represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law."'" (*Id.* at p. 325.) In *Brown*, the court did not apply the *Estrada* rule because "a statute increasing the rate at which prisoners may earn credits for good behavior does not

represent a judgment about the needs of the criminal law with respect to a particular criminal offense, and thus does not support an analogous inference of retroactive intent." (*People v. Brown*, *supra*, at p. 325.)

Similarly here, *Estrada* does not control because applying the definition of "unreasonable risk to public safety" in Proposition 47 to petitions for resentencing under the Act does not reduce punishment for a particular crime.[2] Instead, the downward modification of a sentence authorized by the Act is dependent not just on the current offense but on any number of unlimited factors related to the individual offender, including criminal conviction history, disciplinary and rehabilitation records, and "[a]ny other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (Pen. Code, § 1170.126, subd. (g)(3).)

Because section 1170.18(c)'s definition of "unreasonable risk of danger to public safety" does not apply retroactively to the Act, the sentencing court applied the correct standard in exercising its discretion to not resentence defendant. Since defendant has failed to show an abuse of that discretion, I concur in the majority's affirmance of the judgment.

_____

PEÑA, J.

[2]For this reason, *Holder v. Superior Court* (1969) 269 Cal.App.2d 314, also relied upon by defendant, does not apply because its analysis and conclusion were based on *Estrada* prior to its clarification by subsequent California Supreme Court cases.